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6 PENGUIN MAGIC, INC.

7 **UNITED STATES DISTRICT COURT**
8 **CENTRAL DISTRICT OF CALIFORNIA**
9 **WESTERN DIVISION**

10 YIGAL MESIKA, an individual,
Plaintiff,

11 vs.

12 PENGUIN MAGIC, INC., a Nevada
corporation, DOES 1-10, inclusive,
13 Defendant.

Case No. 2:15-cv-09314-RGK-DTB

**DECLARATION OF ACAR
ALTINSEL IN SUPPORT OF
PENGUIN MAGIC'S MOTION FOR
SUMMARY JUDGMENT OR, IN
THE ALTERNATIVE, PARTIAL
SUMMARY JUDGMENT**

Judge: Hon. R. Gary Klausner

15 I, Acar Altinsel, declare as follows:

16 1. I am over the age of 18 have personal knowledge of the facts stated
17 herein and if called as a witness, will be able to testify competently to such facts,
18 except as to those alleged on information and belief, and as to those facts, I believe
19 them to be true.

20 2. I am one of the founders of and a current owner of Penguin Magic,
21 Inc. ("Penguin Magic"). Penguin Magic was founded in 2002, and I have been a
22 lead employee and officer of the company continuously from that time until the
23 present.

24 3. Penguin Magic is one of the largest Internet Retailers of magic
25 products. It markets and sells products to consumers on its website
26 www.penguinmagic.com. Penguin Magic sells hundreds of magic products,
27 including products by Yigal Mesika ("Mesika").
28

1 4. Among the products Penguin Magic sells is invisible elastic thread.
2 Invisible elastic thread is very fine thread that can be difficult to see with the naked
3 eye, used by magicians to perform tricks that make it appear as though objects are
4 moving or levitating independently. For some tricks, invisible elastic thread is
5 formed into a circle, one end is laid over the other, and the thread is knotted,
6 forming a loop of thread.

7 5. On information and belief, for as long as magicians have been tying
8 invisible elastic thread into loops, they have been referring to them as “loops.” On
9 information and belief, consumers and other magicians use the term “loops”
10 interchangeably to describe any such loop of invisible elastic thread. On
11 information and belief, consumers use the term “loops” when discussing how to
12 make their own loops of invisible elastic thread—not how to make imitations of
13 Mesika’s products.

14 6. As a member of the online magic community, I am familiar with
15 Theory11.com. On information and belief, Theory11.com is a website directed to
16 the community of magicians. On information and belief, Theory11.com hosts web
17 forums, to which members of the Theory11.com website can post messages and
18 publish replies to messages. On information and belief, the Group Exhibit of
19 Theory11.com Posts, Ex. J to the Declaration of Mark Deming, are examples of
20 posts and replies made on the web forums of the Theory11.com website. The use
21 of the term “loops” in those posts and replies is consistent with my understanding
22 of how magic consumers use the term “loops” generally.

23 7. As a member of the online magic community, I am familiar with
24 Ellusionist.com. On information and belief, Ellusionist.com is a website directed
25 to the community of magicians. On information and belief, Ellusionist.com hosts
26 web forums, to which members of the Ellusionist.com website can post messages
27 and publish replies to messages. On information and belief, the Group Exhibit of
28

1 Ellusionist.com Posts, Ex. K to the Declaration of Mark Deming, are examples of
2 posts and replies made on the web forums of the Ellusionist.com website. The use
3 of the term “loops” in those posts and replies is consistent with my understanding
4 of how magic consumers use the term “loops” generally.

5 8. As a member of the online magic community, I am familiar with The
6 Magic Cafe.com. On information and belief, The Magic Cafe.com is a website
7 directed to the community of magicians. On information and belief, The Magic
8 Cafe.com hosts web forums, to which members of the The Magic Cafe.com
9 website can post messages and publish replies to messages. On information and
10 belief, the Group Exhibit of The Magic Cafe.com Posts, Ex. L to the Declaration of
11 Mark Deming, are examples of posts and replies made on the web forums of the
12 The Magic Cafe.com website. The use of the term “loops” in those posts and
13 replies is consistent with my understanding of how magic consumers use the term
14 “loops” generally.

15 9. As a member of the online magic community, I am familiar with
16 Wikipedia’s Glossary of Magic (illusion) page, Ex. P to the Declaration of Mark
17 Deming. On information and belief, the contents of Wikipedia’s Glossary of
18 Magic (illusion) page is determined by users of the Wikipedia website. On
19 information and belief, Wikipedia’s Glossary of Magic (illusion) page includes a
20 definition for the term “loop,” which is “a super-thin elastic string, tied into a small
21 circular loop, worn on the wrist. Used for levitating small, lightweight objects and
22 many PK effects.” This definition is consistent with my understanding of how
23 magic consumers use the terms “loop” or “loops” generally.

24 10. On information and belief, the term “loops” does not identify who has
25 made the loop, where it comes from, or who vouches for it; rather, it merely
26 describes what the product is regardless of who supplied it.

27 11. The products Penguin Magic sells include:
28

- a) Innercircle by Yigal Mesika;
- b) Loops by Yigal Mesika;
- c) Loops by Yigal Mesika (3 pack);
- d) Loops Improved by Yigal Mesika;
- e) Loops New Generation by Yigal Mesika;
- f) Loops Vol. 1-2 by Yigal Mesika and Finn Jon (2 DVDs);
- g) Loops COMPLETE by Yigal Mesika (2DVD set + 20 Loops);
- h) Mesika Elastics by Yigal Mesika;
- i) Yigal Mesika's Animated Miracles Book;
- j) The Million Dollar Knot (Instant Download + PET2.0);
- k) Legacy Thread by Sebashtion (300ft Spool); and
- l) As Real As It Gets by Losander (DVD kit)

12. Mesika authorized distributors of Mesika products have included Murphy's Magic Supplies, Inc., Fun Incorporated, and Magic City. The products identified at Paragraph 7(a) through (i) above are Mesika products, every unit of which Penguin Magic purchased from Murphy's Magic Supplies, Inc., Fun Incorporated, or Magic City. Penguin Magic does not and has never sold any products—other than Mesika's—bearing the name "LOOPS" whatsoever.

13. The remaining products at Paragraph 7(j) through 7(l) are not Mesika products. The Million Dollar Knot is an instruction video that explained how to tie loops of invisible elastic thread. Legacy Thread is a spool of invisible elastic thread. Legacy Thread is not loops of invisible elastic thread. The As Real As It Gets DVD Kit consists of an instruction video together with physical gimmicks that can be used to perform the tricks taught by the instruction video.

14. Penguin Magic's website uses a "tag" system that assigns relevant keywords to particular products. For example, a product on the Penguin Magic website that may be useful for "close up" magic may be assigned the tag "close-

up.” Similarly, a product on the Penguin Magic website that features playing cards may be assigned the tag “card-trick.” Penguin Magic does not tag The Million Dollar Knot, Legacy Thread, or the As Real As It Gets DVD Kit with a “loops” tag.

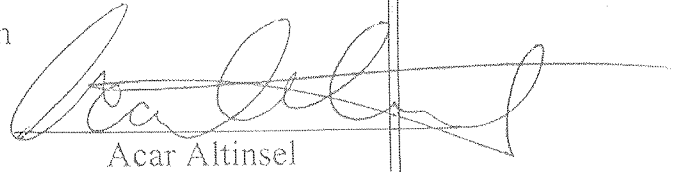
15. Penguin Magic’s website also uses meta “tags” or keywords, which can assist in the indexing of its website by third-party search engines. On each product page on the Penguin Magic website, Penguin Magic uses three categories of meta information: (1) a description; (2) keywords; and (3) product classification. The “description” meta field consists of the first 225 characters of the product’s description that is displayed on a given product page. The product descriptions for The Million Dollar Knot, Legacy Thread, and the As Real As It Gets DVD Kit do not include the term “loops.” The “keyword” meta field has the fixed values “magic tricks, “magic shops,” “card tricks,” “street magic,” “levitation,” “magic store,” and “magic supplies.” The “classification” meta field has the fixed values “magic tricks,” “magic shop,” “card tricks,” “street magic,” “levitation,” “card magic,” “magic store,” “magic supply,” and “magic supplies.”

16. In 2014, Mesika contacted Penguin Magic with a complaint about the loops of invisible elastic thread that were being included in the As Real As It Gets DVD Kit. For business reasons and to avoid the present dispute, Penguin Magic in good faith voluntarily changed what was a small portion of its practice and included Mesika LOOPS shortly after Mesika complained about the issue to Penguin Magic. Penguin Magic’s decision to include Mesika LOOPS with the As Real As It Gets DVD Kit was not a concession as to the merits of Mesika’s claim, but an accommodation intended to avoid an unnecessary and frivolous dispute. Neither the product packaging nor the video itself included in the Real As It Gets DVD Kit says that the kit includes Mesika’s LOOPS.

17. I declare under penalty of perjury under the laws of the United States

that the foregoing is true and correct and that this Declaration was executed on
September 28, 2016 at Ann Arbor, Michigan

Dated: September 28, 2016



Acar Altinsel